Supreme Court, U.S.
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No. 01-1261

IN THE

Supreme Court of the United States

JULIE GRANDSON, *et al.*,

Petitioners,

v.

UNIVERSITY OF MINNESOTA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the United States Court of Appeals for the Eighth Circuit correctly apply precedent from this Court when it held that Petitioners were not entitled to a trial on claims for money damages?

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Respondents respectfully request that this Court deny the Petition for a writ of certiorari seeking review of the United States Court of Appeals for the Eighth Circuit's decision in *Grandson v. University of Minnesota*, 272 F.3d 568 (8th Cir. 2001), Pet. App. at 1-14.[1] These two actions raise allegations about the way in which the University of Minnesota operates its athletics program on its campus in Duluth ("UMD").[2] The trial court, Chief Judge Paul Magnuson of the United States District Court for the District of Minnesota, heard the cases together. Finding no genuine issue of material fact, Judge Magnuson granted the University's Motion for Summary Judgment in both cases. *See* Memorandum and Order, filed February 1, 1999, Pet. App. at 22-34. The Court of Appeals affirmed. *Grandson*, 272 F.3d at 576, Pet. App. at 14. The Court of Appeals correctly analyzed and followed precedent from this Court when it affirmed the District Court's award of summary judgment in favor of the University. This case does not present an issue warranting this Court's review.

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1. Petitioners sued the University of Minnesota, its Board of Regents and current and former University employees and members of the Board of Regents. The individual defendants were joined in their official capacity. This brief is submitted on behalf of all named Respondents, who are collectively referred to as "the University."

2. Julie Grandson filed the first case seeking injunctive relief and damages. *See* Complaint, CAP App. at 26-36. Jennifer Thompson, Ginger Jeffrey and Renata Lindal filed the second case seeking only injunctive relief (this action is referred to as the *Thompson* case). *See* Complaint, CAP App. at 37-59. The *Thompson* Plaintiffs later moved to amend their complaint to insert additional plaintiffs and to add claims for money damages. The trial court denied this motion. *See Order*, filed August 17, 1998, Pet. App. at 20-21. The trial court also struck the *Thompson* Plaintiffs' class action allegations. *See* Memorandum and Order, Pet. App. at 25. Petitioners have not sought review of the decision on the class action issue or of the rulings below on injunctive relief issues.

STATEMENT OF THE CASE

Petitioners' "Statement of the Case" disagrees with and ignores findings made by the District Court and the Court of Appeals and grossly mischaracterizes the facts in the record.[3] Consistent with Sup. Ct. R. 15.2, the University will correct the misimpression left by Petitioners in their Statement of the Case.

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3. For example, Petitioners argue that the evidence shows "UMD's History of Intentional Noncompliance With Title IX." Pet. at 4 and 23. To the contrary, both the District Court and the Court of Appeals found that there was not evidence in the record supporting a finding that UMD had intentionally discriminated against the Petitioners. *See* Memorandum and Order, Pet. App. at 30 ("Grandson has not coupled this allegation about disparate funding with any other evidence which would support an unequal treatment claim, such as proof of intentional discrimination or deliberate disregard for women's athletics."); *Grandson*, 272 F.3d at 575, Pet. App. at 12 ("A vigorous public debate on these issues does not demonstrate that UMD knew of systematic non-compliance."). This finding was the basis for the summary judgment awarded to the University, and Petitioners simply ignore it in the Petition. Elsewhere in their brief, Petitioners rely upon a report from the Office of Legislative Auditor ("OLA") and contend that it found that "UMD had misused" legislatively appropriated funds. Pet. at 15. A review of the document at issue disproves Petitioners' rhetoric. The OLA did not find that UMD discriminated against women, or that UMD had misappropriated money. The OLA noted that "[c]ost allocation is not a precise science" and it took issue with some of the accounting practices UMD followed in 1994-96. OLA report at 7, CAP App. at 275. However, the OLA noted that UMD had changed those practices: "We found that UMD has been responsive to the internal audit and investigative reports. It has taken steps to improve its cost allocation and budgetary practices for the women's athletic program." *Id.* at 8. The OLA made additional recommendations, and UMD acknowledged that it already had addressed these issues. *See* Letter from University in response to OLA report, CAP App. at 291-95.

Athletics At UMD

During the 1999-2000 academic year, UMD offered fifteen varsity sports: seven for men (baseball, basketball, cross-country, football, ice hockey, tennis, and track and field) and eight for women (basketball, cross-country, ice hockey, soccer, softball, tennis, track and field, and volleyball). With the exception of ice hockey, all of UMD's varsity sports compete at the Division II level within the National Collegiate Athletic Association ("NCAA"), and participate in the Northern Sun Intercollegiate Conference. Ice hockey receives more financial support than any of the other sports offered at UMD, because it is a Division I sport. *Grandson*, 272 F.3d at 572, Pet. App. At 5-6.

Women's Athletics At UMD Since 1988[4]

The participation opportunities for female student-athletes at UMD have grown tremendously since 1988. *See* Squad Lists, Resp. CAP App. at 18;[5] *see also* Memorandum

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4. Courts have held that the Restoration Act, 20 U.S.C. § 1687 (1988), was passed to make Title IX applicable to athletic programs. *See Cohen v. Brown Univ.*, 991 F.2d 888, 894 (1st Cir. 1993). Accordingly, 1988, the year the Restoration Act became effective, is a logical point to begin the analysis here. The Restoration Act does not specify an effective date, so the normal rule that the statute takes effect on the date of its passage applies. *See, e.g., United States v. York*, 830 F.2d 885, 892 (8th Cir. 1987), *cert. denied*, 484 U.S. 1074 (1988) (citations omitted). The Restoration Act was vetoed by the President, and this veto overridden on March 22, 1988, 134 Cong. Rec. D 295 (daily ed. March 22, 1988), making March 22, 1988 the effective date of the Act. 2 Norman J. Singer, *Sutherland Statutory Construction* § 33.06, at 12-14 (5th ed. 1992).

5. "Resp. CAP App." refers to the Appendix filed with the University's Brief in the Court of Appeals.

and Order, Pet. App. at 23. The resources devoted to women's sports have increased as well. In 1988, the amount of money devoted to specific women's sports through payroll and operating expenses was $152,308. For 1998-99, the sport-specific expenditures on women's sports more than tripled. *See* Affidavit of Susan M. MacDonald, Resp. CAP App. at 183.

UMD also has changed its athletics program in response to assessments of student interests and abilities since 1988. *See* Student Surveys, Resp. CAP App. at 50. Two varsity sports were dropped in 1991,[6] and two women's varsity sports were added: soccer began varsity competition in 1994 and financial support for it has grown every year,[7] and women's ice hockey began Division I play in 1999. *See* Memorandum and Order, Pet. App. at 23-24.

With respect to women's ice hockey, Petitioners claim that UMD should have added this sport earlier. Pet. at 12-15. The evidence does not leave room for this argument. The evidence shows that UMD students wrote to the administration in April 1997 about women's ice hockey.

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6. Men's and women's golf and men's and women's skiing were dropped in 1991, prior to Petitioners' attendance at UMD. The evidence confirms that these sports were dropped for legitimate, nondiscriminatory reasons. *See* University's Answers to Interrogatories, Resp. CAP App. at 156 (listing reasons for decision to drop teams).

7. Petitioners argue that "UMD cut the already impoverished women's soccer budget" in 1995. Pet. at 11. That the soccer budget may have been reduced is irrelevant. The undisputed fact is that the amount actually expended on soccer, as opposed to what was budgeted, grew every year of the program's existence, consistent with the plan to phase-in this sport. *See* Cane Affidavit and MacDonald Affidavit, Resp. CAP App. at 55 and 187-188; *see also* Memorandum and Order, Pet. App. at 23-24 (acknowledging phase-in of soccer).

Contrary to Petitioners' suggestion, Pet. at 13, UMD did not reject the proposal out of hand. Rather, administrators began meeting with students, and the students presented a proposal for adding women's ice hockey as a varsity sport in the summer of 1997. The students' proposal requested that UMD phase-in women's ice hockey as a new varsity sport over a two-year period, and this is exactly what UMD did. *See* Lindal Deposition at 112, 126, 136, Resp. CAP App. at 66-68; Fox Deposition at 170-171, Resp. CAP App. at 162-163. UMD hired Shannon Miller, coach of the 1998 Canadian Olympic women's ice hockey team, to be the head coach of its women's ice hockey program, and after only two years of competition, Coach Miller lead her team to the NCAA National Championship in 2001. *Grandson*, 272 F.3d at 572, Pet. App. at 6 (recognizing National Championship). UMD also won the NCAA National Championship this year.

The Office For Civil Rights Process

Prior to the commencement of these cases, UMD received notification that a complaint had been filed with the United States Department of Education, Office for Civil Rights ("OCR"), raising issues regarding the operation of UMD's athletics program. *See* August 28, 1996 letter from OCR, Resp. CAP App. at 70.[8] On April 1, 1997, UMD entered into an agreement with OCR to resolve all of the issues raised in the complaint. *Grandson*, 272 F.3d at 572, Pet. App. at 4-5. On November 1, 2000, OCR, the agency Congress charged with enforcing Title IX, closed its file on UMD and issued a letter indicating that UMD had met its obligations. *Id.*

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8. Petitioners incorrectly assert that the government filed this complaint. Pet. at 6-7. The notification letter from OCR disproves Petitioners' assertion.

The Petitioners

The four Petitioners in these cases are former students at UMD. Three of the Petitioners were soccer players at UMD. Julie Grandson was on the soccer team in 1994 and 1995. She quit the team after two seasons, and she has since graduated. *See* Memorandum and Order, Pet. App. at 24.[9] Jennifer Thompson was on the team for four years: 1994, 1995, 1996 and 1997. Having exhausted her eligibility to participate in collegiate soccer, Thompson quit school at UMD following the fall quarter of her fourth year. *See id.* Ginger Jeffrey played on the soccer team for four years, in 1995, 1996, 1997, and 1998, and she also exhausted her eligibility. *See id.* Jeffrey received athletic scholarship aid in the amount of $3,000 for the 1997-98 academic year. *See* Jeffrey Deposition at 39-40, attached as Exhibit 1 to Supplemental Gildea Affidavit, submitted with Defendants' Reply Memorandum in Further Support of Their Motion for Summary Judgment.

The final Petitioner, Renata Lindal, claimed to want to play Division I women's ice hockey at UMD. As the District Court recognized however, Lindal was a "relative late-comer to the sport," Pet. App. at 24, not beginning to play organized hockey until she was a first-year student at UMD in 1995.[10]

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9. Petitioners argue that Grandson complained of "discriminatory treatment" to UMD. Pet. at 11. The memorandum at issue was written after Grandson had quit the soccer team and after she had already decided to sue the University. *See* CAP at 241. Accordingly, as the Court of Appeals properly concluded, this memorandum did not entitle Petitioner Grandson to a trial on her claim for money damages. *Grandson*, 272 F.3d at 576, Pet. App. at 13.

10. Lindal was on UMD's track team for one academic quarter, and she admitted that male and female track athletes were treated equally based upon what she observed. Lindal Deposition at 72-74, Resp. CAP App. at 57-58.

When UMD added women's ice hockey, Lindal did not even try out for the team and she has quit school. *See* Miller Affidavit and Carlson Affidavit submitted in support of University's Suggestion of Partial Mootness.[11]

REASONS FOR DENYING THE WRIT

Petitioners argue that this Court needs to review the Court of Appeals decision to resolve a split among the United States Circuit Courts of Appeals over the correct standard for awarding money damages to plaintiffs in Title IX athletics cases. Pet. at 24-29. There is no such split requiring this Court's review and even if there were such a split in the circuits, this case is not an appropriate case to resolve it.

1. There Is No Conflict Among The Circuits That Requires This Court's Review.

While this Court has never held that plaintiffs can recover money damages in the context of a Title IX athletics case,

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11. In their description of the parties, Petitioners list two additional individuals whom they sought to add as plaintiffs to their case, Paula Olson and Alexandra Wongstrom. The Court does not have jurisdiction to hear issues relating to these individuals. Petitioners' Motion to Amend the Complaint to add these individuals as plaintiffs was denied by the Magistrate Judge, and Petitioners did not appeal this portion of the Magistrate's ruling to the District Judge. *See* Plaintiffs' Objections to Magistrate's Report, Resp. CAP App. at 1. Since they did not appeal this ruling to the District Judge, Petitioners cannot now seek review of issues relating to proposed Plaintiffs Olson and Wongstrom. *See, e.g., Continental Cas. Co. v. Dominick D'Andrea, Inc.*, 150 F.3d 245, 251 (3d Cir. 1998); *Pagano v. Frank*, 983 F.2d 343, 345-46 (1st Cir. 1993). *See also* Fed. R. Civ. P. 72(a) ("Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made.").

this Court has held that money damages are available for intentional sexual harassment discrimination under Title IX. *See Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 74-75 (1992). Petitioners relied upon the standard in *Franklin* in seeking to amend their Complaint in the *Thompson* action to include claims for money damages. *See* Plaintiffs' Memorandum Brief in Support of Motion to Amend Complaint, dated April 21, 1998, at 6 (citing *Franklin*). In *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), this Court identified one way that plaintiffs could satisfy the intentional discrimination standard established in *Franklin*. This Court held in *Gebser* that plaintiffs could pursue damages claims for violation of Title IX if they showed that the alleged unlawful behavior was brought to the attention of the defendant, through notice to an appropriate official, and that the defendant was deliberately indifferent to the claimed unlawful behavior. *Id.* at 290.

Petitioners contend that the Fifth, Sixth and Eighth Circuits now have different standards of proof on the question of money damages for Title IX athletics cases. *See* Pet. at 24-29. There is not a circuit split that requires resolution from this Court. If money damages are available in a Title IX athletics case, the intentional discrimination standard of *Franklin* must at a minimum be met.[12]

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12. If plaintiffs in athletics cases could recover money damages under Title IX for something less than intentional discrimination, serious constitutional problems would be presented. *See Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (recognizing that disparate impact regulations were not enforceable through private right of action and declining to address arguments that "implied causes of action against states are inconsistent with clear statement rule"); *Guardian Assn. v. Civil Serv. Cmm'n of New York City*, 463 U.S. 582, 598, 607 n.27 (1983) (noting that majority of justices agree that money damages were not available under Title VI absent intentional discrimination).

Petitioners contend that the *Gebser* test for proving intentional discrimination is the law in the Eighth Circuit and that the Fifth and Sixth Circuits are to the contrary. Petitioners miscast the opinions. The cases are all in agreement that evidence of intentional discrimination is the standard. As the Sixth Circuit noted, the methods of meeting that standard may vary depending on the facts of each case. *Horner v. Kentucky High School Athletic Ass'n.*, 206 F.3d 685, 693 (6th Cir.), *cert. denied*, 531 U.S. 824 (2000) ("We can envision various scenarios in which the discriminatory animus and deliberate indifference tests might help establish 'intent' under Title IX"). The Sixth Circuit declined to adopt a specific methodology in *Horner* because it found that the plaintiffs there had not proven a violation of Title IX. *Id.*[13]

The Fifth Circuit applied a discriminatory animus test in finding that the plaintiffs in that case had sufficient evidence of intentional discrimination to proceed to trial on their claims for money damages. *Pederson v. Louisiana State University*, 213 F.3d 858, 879-882 (5th Cir. 2000). The Court of Appeals there found that the *Gebser* test while "arguably met," was not applicable to the facts of that case. *Id.*

By contrast, in this case, the Eighth Circuit found that the *Gebser* test was appropriately applied to the facts of this case. This finding is consistent with *Gebser*. As this Court noted in *Gebser*, there is no private right of action expressed in Title IX. Rather, the cause of action for individuals is judicially implied. 524 U.S. at 283-284. Accordingly, the judiciary has "a measure of latitude to shape a sensible

13. The District Court reached a similar conclusion in this case. *See* Memorandum and Order, Pet. App. at 29 ("Even if *Gebser* were limited to sexual harassment cases, though, Grandson's claims would still fail.").

remedial scheme that best comports with the statute." *Id.* at 284. Congress' "express means of enforcement" for Title IX is the agency process. *Id.* at 288. "Where a statute's express enforcement scheme hinges its most severe sanction on notice and unsuccessful efforts to obtain compliance, we cannot attribute to Congress the intention to have implied an enforcement scheme that allows imposition of greater liability without comparable conditions." *Id.* at 290. In this case, the Court of Appeals recognized that UMD had gone through Congress' chosen process and successfully satisfied the agency. *Grandson*, 272 F.3d at 572 and 576, Pet. App. at 4-5 and 14. Under these factual circumstances (assuming money damages were even available as a remedy), the Court of Appeals found that the *Gebser* test was the appropriate method for satisfying *Franklin's* intentional discrimination standard.[14] As both the District Court and Court of Appeals found, Petitioners did not meet this test.

2. This Case Does Not Present An Opportunity To Resolve Any Conflict.

If this Court finds that the Eighth and Fifth Circuits are in conflict, this Court should still not review this case because Petitioners do not meet either standard. As one of the cases Petitioners cites notes, the *Gebser* test is a less rigorous test for proving intentional discrimination than the discriminatory animus test. *Horner*, 206 F.3d at 693 n.4 (noting that "[t[he discriminatory animus test" is "stricter" than

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14. In contrast, the institution in *Pederson* did not get the same favorable findings from the agency. *Pederson*, 213 F.2d at 880 (noting that OCR's "findings confirmed [athletics director's] ignorance of the actual state of compliance with Title IX by his athletic program").

Gebser's deliberate indifference test). If, as the Court of Appeals correctly held in this case, Petitioners could not meet the more lenient test of deliberate indifference, they certainly could not meet the more rigorous discriminatory animus standard they now apparently advocate. Indeed, during the briefing on appeal, Petitioners did not seriously challenge the applicability of the *Gebser* standard. Rather, they argued repeatedly in their briefs to the Court of Appeals that they had met *Gebser's* notice and deliberate indifference test. *See* Petitioners' Brief on Appeal at 32-35, 44-47 and Reply Brief at 8-18 (arguing that evidence satisfies *Gebser*).[15] The District Court and the Court of Appeals disagreed.

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15. To support this assertion, Petitioners cited to the same documents they rely upon in the Petition. These documents — including inadmissible newspaper articles and documents written years, and in some cases decades, before Petitioners were students at UMD — are not relevant to the question of whether they themselves were subject to intentional discrimination. Moreover, a review of the actual text of the documents, as opposed to Petitioners' characterization of them, does not show that UMD deliberately discriminated against female athletes or that UMD admitted it was violating Title IX. Petitioners also rely upon an affidavit from the former track and field coach at UMD, Eleanor Rynda, in arguing that there is at least a question of fact as to whether they met the *Gebser* standard. Pet. at 7-8. This affidavit does not create a question of fact. Eleanor Rynda was the coach of the track and field teams (men's and women's) at UMD. Petitioners are not alleging discrimination as a result of being on the track and field team. Indeed, the one Petitioner who was on the track team, confirmed that there was nothing about her experience on this team that lead her to conclude that she was discriminated against. *See* Lindal Deposition at 72-74, Resp. CAP App. at 57-58; *see also* Memorandum and Order, Pet. App. 25 n.3.

Moreover, the District Court held, as an alternative to its *Gebser* holding, that Petitioner Grandson did not meet the higher standard of discriminatory animus. The District Court held:

> Even if *Gebser* were limited to sexual harassment cases, though, Grandson's claim would still fail. She apparently relies solely on the fact that the women's soccer team receives less university funding than some men's varsity teams to support her charge. However, nothing in either Title IX or the regulations associated with the statute mandates that a university spend equal amounts of money on male and female athletic teams. 34 C.F.R. § 106.41(c) makes this quite explicit, stating "[u]nequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams . . . will not constitute non-compliance with this section." As a result, a funding disparity between men's and women's teams by itself is insufficient to support an unequal treatment claim. Grandson has not coupled this allegation about disparate funding with any other evidence which would support an unequal treatment claim, such as proof of intentional discrimination or deliberate disregard for women's athletics. As a result, her unequal treatment claim would fail on this ground as well.

See Memorandum and Order, Pet. App. at 29-30.[16] The Court of Appeals did not disturb this finding. Petitioners are thus

16. This finding was made for Petitioner Grandson but it is equally applicable to the *Thompson* Petitioners since they relied upon the same evidence as Grandson in opposing summary judgment.

incorrect to argue that they "would have been allowed to proceed to trial" under the measure used in *Pederson*. Pet. at 27.[17]

Since Petitioners do not meet either the deliberate indifference test or the discriminatory animus test, this case presents no occasion for the Court to render anything other than an advisory opinion on the split Petitioners say exists. Accordingly, the Petition should be denied.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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17. The evidence in *Pederson* showed intentional discrimination even under the stricter discriminatory animus test. For example, the athletic director in *Pederson*, when meeting with one of the Plaintiffs to discuss her concerns over equal treatment, referred to her "repeatedly as 'honey,' 'sweetie' and 'cutie' and negotiated with her by stating that 'I'd love to help a cute little girl like you' " The director "also opined that soccer, a 'more feminine sport,' deserved consideration for varsity status because female soccer players 'would look cute running around in soccer shorts.' " 213 F.3d at 881. As the District Court and Court of Appeals recognized, there is no evidence indicating that Petitioners in this case were subject to such behavior.